

STATE OF NEW HAMPSHIRE
SUPREME COURT
ADVISORY COMMITTEE ON JUDICIAL ETHICS

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QUESTION PRESENTED:

Is it a conflict for a judge to hear cases in which litigants are represented by a law firm to which the judge's ex-spouse (and ex-law partner) is "of counsel"?

FACTS PRESENTED:

From the information provided by the judge, the judge was divorced more than fifteen years ago, and at that time, the law partnership between the judge and the judge's ex-spouse was also dissolved. At the time of the dissolution of the law partnership and prior to becoming a full time judge, the judge became associated with a law firm, other than the firm to which the judge's ex-spouse has recently become "of counsel." No continuing financial rights or interests exist between the judge and the judge's ex-spouse, either from the divorce or the dissolution of their law partnership. The judge has no knowledge of the financial relationship between the ex-spouse and the firm to which the ex-spouse is "of counsel."

DISCUSSION AND APPLICATION OF CODE OF JUDICIAL CONDUCT:

Under Canon 2A and B of the Code of Judicial Conduct (Supreme Court Rule 38, effective October 1, 2001), a judge's obligation is to act, at all times, in a manner which preserves the impartiality and appearance of impartiality of the judiciary. This obligation includes avoiding the fact, or creating the impression, that a familial or other personal or professional relationship would influence the judge. The former marital and professional relationship between the judge and the judge's ex-spouse, as well as the ex-spouse's professional relationship as "of counsel" to a firm that may appear in proceedings before the judge, at least raises a potential concern about the appearance of the judge's impartiality.

Under Canon 3E(1) and commentary, a judge shall disqualify herself or himself in a proceeding in which the judge's impartiality might reasonably be questioned by a disinterested person fully informed of the facts, regardless of whether the specific rules on disqualification under this Canon apply. The commentary further suggests that "[a] judge should disclose on the record information that the judge believes that parties or their lawyers might consider relevant to the question of disqualification even if the judge believes there is no real basis for disqualification." Emphasis added.

Canon 3E(1) requires disqualification when, inter alia: a judge has a personal bias or prejudice concerning a party's lawyer (Canon 3E(1)(a)); the judge's spouse or member of the judge's family has a financial interest in the subject matter in controversy (Canon 3E(1)(c)); a judge's spouse is acting as a lawyer in the proceeding (Canon 3E(1)(d)(ii)); or a judge's spouse is known to have more than a de minimis interest that could be substantially affected by the proceeding (Canon 3E(1)(d)(iii)).

The "TERMINOLOGY" section of the Code defines the phrase "[m]ember of the judge's family" as including a spouse and relative by marriage. This specific Code definition, as well as the commonly accepted definition of "spouse" and the legally accepted conclusion from the fact of the divorce of the judge, would not include the judge's ex-spouse. Therefore, it is concluded that the specific prohibitions under Canon 3E(1)(c) and (d) cited above would not apply.

Whether or not the judge harbors any lingering, long standing, bias or prejudice toward the ex-spouse and therefore, by extension, to the law firm to which the ex-spouse is "of counsel," is not apparent from the facts presented and can be reasonably known only to the judge. Therefore, the judge's attention is drawn to the specific code requirement of Canon 3E(1)(a), but no opinion can be expressed hereby in such regard, except to conclude that, if such bias or prejudice exists, disqualification is mandatory under the express terms of Canon 3E(1)(a).

With the possible exception for bias or prejudice referred to above, Canon 3F, "Remittal of Disqualification", would not apply since there would be no mandatory disqualification under the facts presented by the judge.

The "PREAMBLE" to the Code instructs that the commentary is not a statement of additional rules, provides guidance to the purpose and meaning of the text of the Code, and that use of the term "should" is hortatory, describing what is "appropriate" but not a binding rule under which the judge can be disciplined. Applying this direction to the commentary under Canon 3E(1), that a judge should disclose relevant information to any question of disqualification, even if the judge concludes there is no real basis for disqualification, the committee finds that it would be "appropriate" for the judge to disclose the judge's prior marital and professional relationship with the attorney serving

as "of counsel" for the firm in question, in any proceeding in which that firm may appear before the judge. The committee advises the judge accordingly.

ADVISORY OPINION ON THE QUESTION PRESENTED:

It is not a "conflict" or basis for disqualification of the judge to hear cases in which a litigant is represented by a law firm to which the judge's ex-spouse/ex-law partner is "of counsel," unless there is actual prejudice or bias toward the ex-spouse. It is appropriate for the judge to disclose the prior marital and professional relationship when the judge's ex-spouse's firm appears before the judge in any proceeding.

THIS ADVISORY OPINION IS ISSUED BY UNANIMOUS CONCURRENCE OF ALL COMMITTEE MEMBERS.

James R. Patten, Vice-Chair

CAUTIONARY STATEMENT

This opinion is advisory only and not binding on the judicial conduct committee, which may, in its discretion, consider compliance with an advisory opinion by the requesting individual as a good faith effort to comply with the Code of Judicial Conduct. Rule 38-A(4)(c).